**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **THOMAS M. RANDOLPH**<br>Claimant<br><br>VS.<br><br>**STATE OF KANSAS**<br>Respondent<br><br>AND<br><br>**STATE SELF INSURANCE FUND**<br>Insurance Carrier | ) | Docket No. 1,031,129 |

## ORDER

Respondent requested review of the April 14, 2009 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on August 11, 2009.

### APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.[1]

### ISSUES

Having concluded claimant gave timely notice of a series of injuries culminating on his last date worked,[2] the ALJ went on to find claimant presumptively permanently and

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[1] Based upon the parties' stipulations, respondent admits an accident occurred on January 13, 2005 but denies that any series of accidents occurred thereafter.

[2] The Award, at p. 7, references an accidental injury occurring on January 13, 2005 and calculates the Award based upon that date. However, when read in its totality, the Award is, in fact, based upon a series of accidents commencing January 13, 2005 and culminating in a "legal" date of accident on September 23, 2005.

totally disabled under K.S.A. 44-510c(a)(2). The ALJ was not persuaded that respondent's evidence effectively rebutted the statutory presumption and therefore, claimant was awarded permanent total disability benefits under K.S.A. 44-510c(a)(2).

Respondent appealed this Award arguing that while claimant admittedly suffered a single acute compensable injury on January 13, 2005, that accident did not result in permanent injury as a result of that accident. Respondent goes on to argue claimant failed to prove that he suffered a series of injuries in the period that followed his initial injury and that he similarly failed to provide timely notice of that series of injuries as required by K.S.A. 44-520. Finally, respondent contends that claimant is capable of substantial gainful employment and therefore he is not permanently and totally disabled. Therefore, to the extent claimant establishes a compensable claim for a series of accidents, any award should take into consideration the evidence that claimant retains the capacity to earn $280 per week.

Claimant urges the Board to affirm the ALJ's Award. Simply put, claimant contends the preponderance of the credible evidence in the evidentiary record is that he suffered an initial low back injury that worsened over a period of time as he continued to perform his heavy physical work duties to the point that he is realistically incapable of performing substantial gainful employment.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record and therefore adopts the same with the exception of the date of accident. It appears that the ALJ calculated her award based upon an accident occurring on January 13, 2005. However, when the Award is read in its entirety, it is clear that the ALJ concluded that claimant suffered a series of accidents thereafter and culminating on September 23, 2005. It is that rationale and implicit finding that the Board adopts. And as for the balance of the ALJ's findings and conclusions, it is not necessary to repeat those in this Order except as needed to explain the Board's Order.

Both parties agree claimant sustained a work-related accident on January 13, 2005 when he slipped and fell, injuring his right shoulder, hip and low back. These areas of injury were all itemized in the initial report of accident.[3] Respondent provided treatment to the shoulder as that was the area that provided claimant with the most pain. Claimant returned to his regular work duties on February 3, 2005. The nature of claimant's job as an

[3] Respondent's Submission Brief at 3 (filed May 15, 2009).

electrician (both before and after January 13, 2005) required him to repair and install power motors, air conditioners, and install or "pull" conduit, an activity that requires 75 to 150 pounds of pull. By all accounts, this was a heavy physical job that regularly required claimant to have the capacity to lift up to 100 pounds.

On February 3, 2005, the same day claimant was released to return to work after his slip and fall, claimant sought treatment from a chiropractor for back complaints. According to claimant, his back and hip were sore and stiff since the accident, but because his shoulder complaints were more prominent, he did not voice those problems. It appears that claimant sought additional treatment with this chiropractor for back and/or hip complaints on February 5, 2005, May 2, 2005, and August 19, 2005 and two times in September 2005. Claimant did not request that respondent authorize this treatment or provide him with a referral to another physician.

Claimant had an unrelated right knee problem which necessitated surgery on March 20, 2005. He was off work for a period of time but returned to full duty on May 23, 2005 and continued working at full duty until September 22, 2005. During the claimant's last week of work he was involved in a project that required him to install 250 foot conduit. He was using a man lift and had to hold up ten feet sections of conduit at a time. Due to a scheduled day off and the need to complete the project, claimant worked quickly, stretching and pulling the wire. During the week claimant noticed that he had pain in his back and into his left leg. This work and the associated symptoms continued until Thursday of that week. Claimant was off work on Friday and spent the day quietly and did not notice anything unusual.

On Saturday morning, claimant testified that he woke up in significant pain. To be clear, claimant testified that he *could not get out of bed,* not that he hurt his back *getting out* of bed.[4] The record contains a reference to a medical record that indicates claimant reported injuring his back *while getting out of bed*. But claimant asserts that is inaccurate. He awoke that morning in pain and could not get up from his bed.

He contacted his chiropractor and later his personal physician who took claimant off work. Claimant contacted his employer on September 26, 2005 and advised that he could not come to work because his back hurt. Claimant says he told his employer this was work-related.[5] Respondent referred claimant for an evaluation and temporary total disability benefits were commenced effective September 23, 2005.[6] Claimant never returned to work for respondent and was apparently terminated. He has not worked anywhere else for wages since that time.

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[4] R.H. Trans. at 34.

[5] *Id.* at 29.

[6] *Id.* at 28-29; ALJ Award at 3.

Claimant was treated conservatively with physical therapy and injections. He was diagnosed with degenerative disc disease, disc protrusion/herniation and central canal stenosis, all confirmed by a MRI. He also had a myelogram with CT which revealed multilevel foraminal stenosis in addition to the canal stenosis. An EMG performed on October 26, 2006 confirmed acute and chronic left sided L5 radiculopathy.

Respondent asked Dr. Paul Stein, a board certified neurosurgeon, to evaluate the claimant for purposes of providing a second opinion as to the need for additional treatment. Dr. Stein diagnosed a preexisting lumbar stenosis with no symptoms before the January 13, 2005 event. He went on to explain that claimant's subsequent work activities after January 13, 2005 were permanent aggravating factors and made his condition worse. He further made it clear that claimant's increase in symptoms and eventual disc herniation and resulting radiculopathy was due to his work activities from January 13, 2005 onward and the aggravating effect of those activities on his body.

Claimant eventually underwent surgery to his low back. Dr. Burton performed a laminectomy and posterior decompression from L2-L5 on February 12, 2008. On June 13, 2008, Dr. Burton concluded claimant was at maximum medical improvement.[7] According to claimant, he did not achieve much benefit from this surgery. He is able to sit for 40 minutes, stand or walk for 20 minutes and he must lay down periodically during the day to minimize his back complaints. Claimant also reports some problems with urinary incontinence.

On July 22, 2008, Dr. Koprivica examined claimant and provided his opinions as to the causation of claimant's low back complaints. He opined that the slip and fall on January 13, 2005 resulted in a permanent aggravating injury - a herniated disc - to claimant's preexisting but asymptomatic lumbar spinal stenosis and lumbar spinal spondylosis. He further opined that claimant's ongoing work duties up to September 22, 2005 contributed to his lumbar condition. He rated claimant at a DRE V, which translates to a 25 percent permanent partial impairment to the whole body.[8] Claimant is restricted to sedentary physical demand work with occasional lifting of 10 pounds, no frequent or constant lifting or carrying. Claimant should only rarely bend at the waist, pull or twist and avoid bending, pushing, pulling or twisting even in his activities of daily living. Dr. Koprivica also recommended that claimant should be able to change his positions, alternating his sitting, standing and walking every 30 minutes and lay down as needed.

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[7] Koprivica Depo., Ex. 2 at 8-9.

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

Dr. Koprivica testified that claimant is permanently and totally disabled, unable to engage in any substantial gainful employment due to his significant restrictions.[9] He also testified that considering claimant's restrictions, claimant has an 89 percent task loss based on the list of 19 tasks provided by Dr. Robert Barnett.

As noted by the ALJ, respondent's counsel attempted in vain to coax testimony from Dr. Koprivica that the simple act of getting out of bed is the source of claimant's present condition. But Dr. Koprivica stood firm in his opinions and conceded only that sneezing or getting out of bed could possibly cause a herniated disk, but that it was a remote likelihood.

Respondent referred claimant to Dr. Chris Fevurly, a board certified occupational physician/internist for an examination on September 9, 2008. He diagnosed much the same conditions as the other two physicians, but his opinion as to the cause of claimant's condition is altogether different. He opined that it is unlikely that claimant could have continued doing his normal work duties from May 2005 (when he returned from knee surgery) up to September 22, 2005 with a herniated disc and the associated radiculopathy that has resulted. And because claimant is obese, with preexisting disc disease, the mere act of getting out of bed is the more likely cause of his disc herniation, consistent with the claimant's complaints and his history as recited in the earlier medical records. In fact, Dr. Fevurly goes so far as to indicate that there is no medical evidence whatsoever that claimant hurt his back in his initial fall.[10] According to Dr. Fevurly, if claimant is taken at his word (again based upon the earlier medical records that he reviewed) claimant hurt his back while getting out of bed at home on September 24, 2005 and not at work.[11] Dr. Fevurly also testified that claimant is fully capable of sedentary work, as long as he is allowed to sit and stand as needed.

At claimant's request, he was evaluated by Dr. Robert Barnett, a clinical psychologist and certified rehabilitation and job placement specialist. Dr. Barnett testified that claimant has a history of 19 nonduplicative tasks in his 15 year work history and based upon his present restrictions, he is only marginally employable. He explained that any employer would need to accommodate his restrictions and allow him to move around. And given his past work history, it will be difficult for him to find such a position. At most, claimant could expect to earn $280 per week, again assuming an employer would accommodate his limitations.

The ALJ summarized claimant's current condition and his complaints as follows:

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[9] Koprivica Depo. at 18.

[10] Fevurly Depo. at 19.

[11] *Id.* at 20.

> Claimant feels he cannot work in any capacity. He is currently drawing social security disability benefits. Claimant currently has extreme low back pain, his right leg is numb all the time with pain shooting down into his knee. Claimant needs to lay down from time to time during the day to relieve pain. Pain never goes away and he can only sit thirty to thirty-five minutes at a time and he cannot stand that long. Claimant is fifty-seven years old. He can no longer do any of the tasks he has done in the last fifteen years. The pain is constant and never goes away. Claimant takes a Lortab every six hours for pain and Lyrica daily. Claimant does not feel that the back surgery helped very much and there has not been a lot of change in his condition before and after the surgery.[12]

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[13] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[14]

The parties agree claimant sustained an accident on January 13, 2005 when he slipped and fell. They also agree that claimant sustained a shoulder injury, gave notice of the injury to his shoulder, hip and back, received treatment for that injury and was released with no further problems. Beyond that, there is little the parties agree upon.

Claimant asserts that after his initial accident, he continued to perform his regular duties sustaining a series of repetitive injuries culminating in an "accident" as of his last date of work on September 22, 2005, giving notice of his back problems and its relationship to the work-related accident when he called in on September 26, 2005 to speak to his supervisor.

Respondent contends that claimant's back complaints began at home on the morning of September 24, 2005 as he was getting out of bed. The subsequent treatment and resulting impairment were caused by his act of getting out of bed, and not by any series of accidents, nor from the initial accident of January 13, 2005. Respondent also argues that even if it was a series of accidents, claimant failed to give notice of his accident in a timely fashion.

The ALJ easily disposed of this aspect of respondent's defenses as follows:

> Respondent contends that [c]laimant did not give notice to the employer of his back injury. The Court does not find that [r]espondent's contention of lack of notice

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[12] ALJ Award (Apr. 14, 2009) at 5.

[13] K.S.A. 2005 Supp. 44-501(a).

[14] K.S.A. 2005 Supp. 44-508(g).

> has merit based on the facts and the law. At the time [c]laimant fell on the ice, he received medical treatment immediately that was provided by the [r]espondent. Since [c]laimant's shoulder hurt at that time, most of the treatment was focused on his shoulder. However, according to [c]laimant, his back and hip were also sore as a result of the fall. It is disputed that [c]laimant reported any back pain to [r]espondent immediately following this accident. Claimant testified that he did and that is uncontroverted. Respondent controverts this with the absence of the back being mentioned in the [c]laimant's medical records until September. However, when the [c]laimant's back pain became so excruciating that he could no longer work and he reported to his employer he could not work because of his back, [r]espondent started temporary total benefits for the [c]laimant after his last day of work and provided him with medical treatment. Further, there is credible medical evidence that is probable that [c]laimant's back was injured in the slip and fall on January 13, 2005 and then became symptomatic as he continued to perform his physically demanding job duties. Claimant's symptoms gradually became more and more severe until [c]laimant became disabled. Respondent admits notice of the accident of January 13, 2005. Further, [r]espondent received notice of the aggravation or the series of micro traumatic injuries to the [c]laimant's back as he continued to work when [c]laimant was taken off work on September 25, 2005. Therefore the Court finds there is statutory notice of the accidental injury.[15]

The Board has reviewed the entire record and finds the ALJ's findings on these points should be affirmed. Respondent's argument is as follows:

> The claimant will likely argue that Drs. Koprivica and Stein have suggested that the claimant's current complaints are related to the fall in January 2005 and/or a series of accidents. Any such opinions are premised upon swallowing whole without question the history given by the claimant, and refusing to consider evidence which rebuts such a self-serving history–evidence which includes the objective lack of back complaint until September 24, 2005, the lack of any effort to seek treatment for any back complaints, working at heavy labor for months without complaints or limitation in his ability to perform his job, and the medical records which document a new accident when the claimant got out of bed on September 24.[16]

Like the ALJ, the Board disagrees with respondent's characterization. In order to adopt respondent's position in this matter the finder of fact would have to ignore several pertinent and undisputed facts.

Claimant's accident report indicated that he hurt his shoulder as well as his hip and back. But the shoulder was by far the more problematic injury at the time. He continued to work his normal work duties performing heavy work. He did so without complaint, but seeking chiropractic care on his own several times, something respondent seeks to ignore.

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[15] ALJ Award (Apr. 14, 2009) at 6-7.

[16] Respondent's Submission Brief at 4 (filed May 15, 2009).

Then, as he worked during that last week, pulling conduit, standing on a ladder and working against time, he again experienced an increase in symptoms and radiating pain. When the pain became overwhelming on Saturday, September 24, 2005, he sought medical treatment and notified his employer on Monday, September 26, 2005. The Board is persuaded that claimant did not hurt his back *getting out of bed*. Rather, his back was hurting as he awoke that morning and make it difficult for him to get out of bed. It was the type of work and the toll it took on claimant's body that caused his accident which culminated on September 22, 2005, his last date of work.[17]

He notified his employer on the following Monday *and medical treatment was provided along with temporary total disability benefits*. He had already filed an accident report back in January 2005 indicating that his shoulder *and hip and back* were injured. Based upon this record, it strains credibility to suggest that claimant did not notify respondent of his back injury and its connection to work given these facts. It is unfortunate that he did not ask respondent for treatment for his back complaints and instead sought chiropractic care on his own. Nevertheless, that standing alone does not discredit his position in this matter. The Board finds the ALJ's conclusions as to timely notice and the existence of a series of accidents culminating on September 22, 2005 should be affirmed.[18]

Turning now to the nature and extent of claimant's impairment, the ALJ concluded that claimant was permanently and totally disabled. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[19]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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[17] Because a series of injuries is found through September 22, 2005, the parties' briefs make it clear there is no dispute that that date forms the legal date of accident.

[18] Again, the Award at p 7 references the January 13, 2005 accident but that is inconsistent with the balance of the Award.

[19] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[20]

In *Wardlow*[21], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The ALJ concluded that claimant was permanently and totally disabled based upon the fact that the more evidence contained within the record as to claimant's ability to work came from Dr. Koprivica, who opined that claimant was unable to engage in substantial gainful employment. He explained that due to claimant's age, ongoing pain, the extent of his restrictions, his past work history and lack of training, claimant was unlikely able to sustain any sort of job. This opinion is bolstered by Dr. Barnett's testimony that claimant is realistically unemployable in the open labor market.

The Board has considered the record as a whole and finds that the claimant is permanently and totally disabled. Much like the claimant in *Wardlow*, claimant's past work history, present condition, ongoing complaints of pain and the need to vary his positions and lie down as needed all work against his ability to sustain a job. The ALJ's Award is, therefore, affirmed in all respects.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated April 14, 2009, is modified to the extent that claimant's date of accident is found to be September 23, 2005 but otherwise affirmed.

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[20] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[21] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

**IT IS SO ORDERED.**

Dated this _____ day of October, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge